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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

LEE ANN BARNICK, Plaintiff and Appellant, v. OFFICE OF ADMINISTRATIVE HEARINGS, Defendant; DEPARTMENT OF CORRECTIONS AND REHABILITATION, Real Party in Interest and Respondent.	C086170 (Super. Ct. No. 34-2017-80002620-CU-WM-GDS)

Petitioner Lea Ann Barnick's adult son, David Jordan Griffin, is a California state prison inmate. The California Department of Corrections and Rehabilitation (CDCR) petitioned for an involuntary medication hearing by defendant Office of Administrative Hearings (OAH) to allow CDCR to continue giving psychotropic medications to Griffin absent his consent. Barnick unsuccessfully moved to join in that hearing (as his mother), and then filed the instant mandamus petition to compel OAH to grant her motion. The trial court denied Barnick's petition, and she timely filed this appeal.

On appeal, Barnick primarily contends she has a constitutional right of familial association with Griffin, a protected liberty interest that supersedes California's statutory and regulatory scheme to the extent it denies her the ability to participate in his involuntary medication hearing. She also raises ancillary statutory claims.

We disagree with Barnick's contentions and affirm.[1]

BACKGROUND

Penal Code section 2602 allows CDCR to obtain orders to provide ongoing (i.e., non-emergency) involuntary medication to prison inmates who are determined by a psychiatrist to have a serious mental disorder such that "the inmate is gravely disabled and does not have the capacity to refuse treatment with psychiatric medications or is a danger to self or others." (See *id*., subd. (c)(1)-(2).) An inmate may challenge the determination and obtain a hearing before an OAH administrative law judge. At that hearing the inmate has the rights to be present, to be represented by counsel, to introduce evidence, and to confront witnesses. (See *id*., subd. (c)(7)(B).) An involuntary medication order lasts for one year and may be renewed if the circumstances justify it.

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[1] A party who represents herself on appeal is held to the same standards and procedural rules as a party who employs counsel. (See *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.) We do not detail here the departures from appellate briefing norms reflected by Barnick's briefing, but we decline to address undeveloped or unsupported claims. (See *In re Marriage of Nichols* (1994) 27 Cal.App.4th 661, 672-673, fn. 3.)

(See *id*., subds. (f) & (g).) The involuntary medication hearings are popularly referred to as "*Keyhea* hearings," a term used in this record that references the seminal California case on the subject, *Keyhea v. Rushen* (1986) 178 Cal.App.3d 526. (See, e.g., *Department of Corrections v. Office of Admin. Hearings* (1997) 53 Cal.App.4th 780, 788 (*DOC*).) Next-of-kin may be notified of a *Keyhea* hearing at the request of the inmate. (See Cal. Code Regs., tit. 15, former § 3364.2(e), now § 3999.346(e).) But there are no statutory or regulatory provisions for a relative to participate generally at the hearing or to join in the matter as a party.

Griffin, Barnick's adult son, is a CDCR inmate. In 2017 CDCR applied to renew Griffin's extant involuntary medication order. Barnick moved to be joined as a party to Griffin's *Keyhea* hearing; her motion failed, and she was told that she could *attend* the hearing but not join it. She thereafter filed the instant petition.[2]

Barnick filed what was captioned as an administrative mandamus petition to compel OAH to grant her motion. In her supporting memorandum (citing *Keyhea* and an expert declaration apparently filed in an unrelated Alaska case), Barnick in part contended the use of psychotropic drugs was not in her son's best interest because they "can impact one's ability to associate" and can shorten his life. She also sought a stay.

After successfully opposing Barnick's stay request, CDCR demurred in part because the petition sought administrative mandamus; CDCR also contended Barnick lacked a cognizable interest in the hearing outcome.

OAH (represented by separate counsel) filed a notice that it would not appear "absent court direction." OAH alleged it was an impartial tribunal and Barnick and

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[2] The parties do not explain the outcome of Griffin's 2017 hearing. No party has informed us that this matter may be moot, so we shall reach the merits. (See *Westchester Secondary Charter School v. Los Angeles Unified School Dist.* (2015) 237 Cal.App.4th 1226, 1233, fn. 2 [where annual process creates a controversy likely to recur between parties, the controversy is not moot].)

CDCR could litigate the matter. In response, Barnick tried to obtain a default judgment against OAH and claimed that CDCR should not be allowed to defend OAH's interests.

CDCR then answered the petition, in part reiterating the claims made in its demurrer (the outcome of which is not shown by the record).

The trial court declined to find OAH in default, treated Barnick's petition as one for traditional mandamus, found Barnick had no right to join in the OAH hearing because she had no constitutional "familial association" right to do so, and concluded this resolved her statutory claims.

Barnick timely appealed from the ensuing judgment. On appeal, CDCR (but not OAH) defends the judgment.[3]

DISCUSSION

I

Standard of Review

Although Barnick filed a petition styled as one for administrative mandamus (Code Civ. Proc., § 1094.5), CDCR contends this is in fact a traditional mandamus proceeding (*id*., § 1085), which is how the trial court interpreted Barnick's petition. Because Barnick does not challenge this interpretation of her petition, we, too, treat it as one for traditional mandamus.[4]

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[3] For the first time in the reply brief Barnick challenges the trial court's decision to treat CDCR as the proper responding party. This challenge comes too late. (See *Utz v. Aureguy* (1952) 109 Cal.App.2d 803, 808.) Although the issue was referenced in passing in the opening brief it was not headed as an argument as required. (See *Loranger v. Jones* (2010) 184 Cal.App.4th 847, 858, fn. 9.)

[4] We deny Barnick's pending (second) motion for judicial notice of an opening brief filed in the trial court. A party cannot rely on or incorporate trial court papers in lieu of making proper arguments on appeal. (See *Garrick Development Co.* v. *Hayward Unified School Dist.* (1992) 3 Cal.App.4th 320, 334.) Thus, the material in question is unnecessary to our decision.

"There are two essential requirements to the issuance of a traditional writ of mandate: (1) a clear, present and usually ministerial duty on the part of the respondent, and (2) a clear, present and beneficial right on the part of the petitioner to the performance of that duty. [Citation.]" (*California Assn. for Health Services at Home v. State Dept. of Health Services* (2007) 148 Cal.App.4th 696, 704.) " 'The authority of the court is limited to determining whether the decision of the agency was arbitrary, capricious, entirely lacking in evidentiary support, or unlawfully or procedurally unfair.' [Citation]" (*Carrancho v. California Air Resources Board* (2003) 111 Cal.App.4th 1255, 1265.) What an agency is legally required to do (or not to do) presents purely legal issues to be reviewed de novo on appeal. (See *DOC*, *supra*, 53 Cal.App.4th at p. 784.)

II

Familial Association Rights

Barnick, in several interwoven sub-claims, contends that she has a constitutional right to participate in Griffin's *Keyhea* hearing. She contends her parental rights trump California's statutory and regulatory scheme regarding *Keyhea* hearings to the extent California law does not grant her the right to participate as a party. We disagree.

A. *Parental Rights Generally*

The high court has held "that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment. [Citations.]" (*Santosky v. Kramer* (1982) 455 U.S. 745, 753; see *Troxel v. Granville* (2000) 530 U.S. 57; see also *In re Marriage of Harris* (2004) 34 Cal.4th 210, 237-238.) Similar cases generally involve minor children and a parent's primary right to make decisions about how to raise them. Further, as summarized by the Ninth Circuit Court of Appeals: "It is well established that a parent has a 'fundamental liberty interest' in 'the companionship and society of his or her child' and that 'the state's interference with that liberty interest without due process of law is remediable under [42 U.S.C. §] 1983.' [Citations.] 'This constitutional interest in familial companionship and society logically extends to protect

children from unwarranted state interference with their relationships with their parents.' [Citations.] Moreover, 'the First Amendment protects those relationships, including family relationships, that presuppose "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." ' [Citations.]" (*Lee v. City of Los Angeles* (9th Cir. 2001) 250 F.3d 668, 685 (*Lee*).)[5]

But there are three basic reasons why we reject Barnick's central claim that her status as Griffin's mother gives her a constitutional right to join in his *Keyhea* hearing.

First, a parent's protected interests in maintaining a relationship with or associating with a child necessarily wane when the child reaches maturity. This is so because at that point the child has a right to decide whether to associate with her or his parent(s). In this context, Barnick and Griffin, as adults, stand in relative equipoise under the constitution. (See *Robertson v. Hecksell* (11th Cir. 2005) 420 F.3d 1254, 1255 ["the Fourteenth Amendment's substantive due process protections do not extend to the relationship between a mother and her adult son"]; *McCurdy v. Dodd* (3d Cir. 2003) 352 F.3d 820, 829 [parental liberty interest "must cease to exist at the point at which a child begins to assume that critical decision making responsibility for himself or herself"].)

Second, Griffin has a state constitutional right to privacy in his own medical and mental health records and treatment. (See Cal. Const., art. I, § 1 [all people have an inalienable right to, inter alia, "privacy"]; *John B. v. Superior Court* (2006) 38 Cal.4th

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[5] *Lee* involved a mentally disabled adult child whose mother held a conservatorship over him. (See *Lee*, *supra*, 250 F.3d at pp. 676, 677.) Barnick claims Griffin's lack of capacity is relevant herein. But she does not claim to have been granted a conservatorship or guardianship over Griffin. Nor does her reliance on generic statutes about personal autonomy advance her view. (Civ. Code, §§ 43 ["every person has . . . the right of protection from bodily restraint or harm . . . and from injury to his personal relations"], 50 ["necessary force may be used to protect from wrongful injury the person or property of oneself, or of a . . . child"].)

1177, 1198 [state constitutional privacy right extends to medical records].) Griffin did not invoke the regulation to have Barnick notified of his *Keyhea* hearing, and a document in the record indicates he did not provide a privacy waiver to allow Barnick to see his medical records. Barnick produced no contrary evidence. In such circumstances, allowing Barnick to join in his hearing as a party absent his consent would violate Griffin's own protected right to privacy.

Third, a point relied on by the trial court--but abandoned without any explanation by CDCR--is that Griffin is a state prison inmate. "Prison necessarily disrupts the normal pattern of familial association, so lawful imprisonment can hardly be thought a deprivation of the *right* of relatives to associate with the imprisoned criminal. [Citation.]" (*Mayo v. Lane* (7th Cir. 1989) 867 F2d 374, 375; see *Jones v. North Carolina Prisoner's Union* (1977) 433 U.S. 119, 125-126 ["The concept of incarceration itself entails a restriction on the freedom of inmates to associate"].) Indeed, the high court has rejected a hypothetical somewhat analogous to Barnick's contention in this case, stating that although family members may "suffer serious trauma" if they have been dependent on a "an errant father" who will be incarcerated, "surely they have no constitutional right to participate in his trial or sentencing." (*O'Bannon v. Town Court Nursing Center* (1980) 447 U.S. 773, 788.) So, too, here.

For all of these reasons we reject Barnick's claim that her parental status trumps the state statutory and regulatory scheme governing *Keyhea* hearings.

B. *Limited Parental Rights Regarding Adult Children*

The parties note (and the trial court addressed) that there is a split of authority about whether a parent can sue for damages for an alleged violation of an adult child's civil rights caused "incidentally" by government action or whether the right to sue extends only to cases where government actors intentionally interfere with the parent-child relationship. (See *Rucker v. Harford County, Md.* (4th Cir. 1991) 946 F.2d 278, 282 [describing the split of federal authority].)

As the trial court pointed out, most federal courts hold that the constitutionally protected parent-child relationship does not last (at least in full force) when a child reaches the age of majority. (See *Russ v. Watts* (7th Cir. 2005) 414 F.3d 783, 788 ["The Supreme Court has recognized violations of the due process liberty interest in the parent-child relationship only where the state took action specifically aimed at interfering with that relationship"]; *Shaw v. Stroud* (4th Cir. 1994) 13 F.3d 791, 805 [rejecting suit against officer who shot adult husband and father; "because the Supreme Court has never extended the constitutionally protected liberty interest . . . to encompass deprivations resulting from governmental actions affecting the family only incidentally"]; *Trujillo v. Board of County Comm'rs* (10th Cir. 1985) 768 F.2d 1186, 1190 [mother and sister of inmate sued claiming wrongful death; held, "an allegation of intent to interfere with a particular relationship protected by the freedom of intimate association is required to state a claim under section 1983"].)

But the Ninth Circuit has rejected the *Trujillo* reasoning, holding that "*Trujillo* imposed [a] requirement of specific intent on a claim of interference with the familial relationship in order to avoid throwing open the judicial floodgates to claims based on merely negligent acts. [Citation.] Now that [*Daniels v. Williams* (1986) 474 U.S. 327] has closed this potential floodgate by requiring the act causing the deprivation to have been more than simply, negligent, [citation] *Trujillo*'s additional focus on the state actor's motivation is no longer necessary to serve its purpose. We therefore decline to follow *Trujillo*. As long as the state official's action which deprived the plaintiffs of their liberty was more than merely negligent, the plaintiffs can state a section 1983 claim without further alleging that the official was trying to break up their family." (*Smith v. City of Fontana* (9th Cir. 1987) 818 F.2d 1411, 1420, fn. 12, overruled on another point by *Hodgers-Durgin v. De La Vina* (9th Cir. 1999) 199 F.3d 1037, 1040, fn. 1; see *Rentz v. Spokane County* (E.D. Wash. 2006) 438 F.Supp.2d 1252, 1265 [Ninth Circuit cases

recognize the "liberty interest of parents in the companionship and society of their adult children, even when the deprivation of that interest is incidental to the state action"].)

As referenced by the trial court, one authority relied on by *Smith* was later overruled. (See *Russ v. Watts*, *supra*, 414 F.3d 783 [overruling *Bell v. City of Milwaukee* (7th Cir. 1984) 746 F.2d 1205].) The trial court then rejected the Ninth Circuit's view. But that view was adopted by *Irwin v. City of Hemet* (1994) 22 Cal.App.4th 507 (*Irwin*).

In *Irwin* an intoxicated arrestee hanged himself while in jail and his parents and minor children sued for wrongful death and deprivation of civil rights. (See *Irwin*, *supra*, 22 Cal.App.4th at p. 514.) *Irwin* outlined the basis for the doctrinal split referenced by the trial court (*id*. at pp. 519-523), explained that there was no mental state requirement for a civil rights violation (*id*. at pp. 522), and held "*Smith v. City of Fontana*, *supra*, 818 F.2d 1411 represents the better rule, and [we] thus decline to require any showing that the state actor specifically intended to disrupt the decedent's family relationships. If the defendants acted with deliberate indifference to the consequences of their action, they are liable for the consequences of those actions both to Irwin and to Irwin's parents and children." (*Id.*, at p. 523.) We accept *Irwin*'s holding for purposes of argument.[6]

As the trial court alternatively found, even applying the Ninth Circuit and *Irwin* view, Barnick's claims do not succeed. She has not explained how denying her motion to join the *Keyhea* hearing violated her rights to associate with Griffin, such as her right to visit him, except for her unsupported claims that medicating him will shorten his life or impair his "ability to associate."

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6 The trial court overlooked the fact that it was not free to consider departing from *Irwin*, which was binding on the trial court. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) But it reached the right result.

The cases relied on by Barnick involve the death of an inmate (such as in *Smith*) or wrongful arrest of an adult child over whom the parent held special legal powers (as in *Lee*). None touch on the issue of this case, either directly or by analogy. Barnick offers no persuasive argument why those cases should be extended to *Keyhea* hearings.

Accordingly, we reject Barnick's constitutional claims.

III

Deprivation of Griffin's Rights

Barnick in part relies on a statute providing that a California prisoner may "be deprived of such rights, and only such rights, as is reasonably related to legitimate penological interests." (Pen. Code, § 2600, subd. (a)(1).) This statute does not confer on Barnick any special rights. It may be used by an inmate to protect familial rights, such as by opposing parental termination petitions or trying to obtain child visitation rights. (See, e.g., 16 Witkin, Sum. of Cal. Law (11th ed. 2018) Juvenile Court Law, § 24, pp. 73-78; 3 Witkin, Cal. Crim. Law (4th ed. 2012) Punishment, § 67, pp. 129-131.) But Griffin is not claiming his rights to interact with Barnick have been violated, and Barnick does not explain how she has standing to raise this kind of issue on his behalf. (See *Mayo v. Lane*, *supra*, 867 F.2d at p. 376 ["the person with the primary stake in the deprivations caused by imprisonment is the prisoner himself, and he rather than his relatives is the proper party to complain about those deprivations"].)

IV

Relevant Evidence

Barnick also contends that she has a statutory right to present evidence at Griffin's *Keyhea* hearing. We disagree with Barnick's interpretation of the law.

As we shall explain, Barnick relies on a misreading of part of the Lanterman-Petris-Short Act (LPS) (Welf. & Inst. Code, § 5000 et seq.), which governs involuntary psychiatric commitments of non-prisoners.

Penal Code section 2602 in part allows an inmate to present evidence at a *Keyhea* hearing (*id*., subd. (c)(7)(B)) and requires that the administrative law judge consider "available relevant information about the course of the inmate's mental disorder" (*id*., subd. (c)(9)) when weighing whether or not clear and convincing evidence (*id*., subd. (c)(8)) supports an involuntary medication order. A renewal order confers the same procedural protections on the inmate as those given in connection with an initial order. (*Id*., subd. (g)(2).) In particular, Penal Code section 2602, subdivision (c)(9) provides: "*The historical course of the inmate's mental disorder, as determined by available relevant information about the course of the inmate's mental disorder*, shall be considered when it has direct bearing on the determination of whether the inmate is a danger to self or others, or is gravely disabled and incompetent to refuse medication as the result of a mental disorder." (Italics added.)

Part of one LPS statute (albeit governing only probable cause hearings) provides: "For purposes of this section, 'information about *the historical course of the person's mental disorder' includes* evidence presented by the person who has provided or is providing mental health or related support services to the person subject to a determination described in subdivision (a), *evidence presented by one or more members of the family of that person*, and evidence presented by the person subject to a determination described in subdivision (a) or anyone designated by that person." (Welf. & Inst. Code, § 5150.05, subd. (b), italics added.)

Based on the Legislature's use of similar language regarding the "historical course" of a person's mental disorder, Barnick reasons that this LPS statute must apply at *Keyhea* hearings, and further contends (in effect) that the language of the LPS statute is mandatory, not directory, and *requires* the introduction of evidence by family members.

We disagree with Barnick's interpretation for several reasons.

First, the LPS statute she relies on by its terms applies to "this section," i.e., the section governing LPS probable cause hearings. That statute does not purport to state a

rule applicable to all other California codes, or more specifically to *Keyhea* hearings. We agree that the legal standards for involuntary treatment in LPS cases may overlap with the standards applicable at a *Keyhea* hearing. (See 3 Witkin, Cal. Crim. Law (4th ed. 2012) Punishment, § 69(4), p. 134.) But the fact that LPS hearings and *Keyhea* hearings may have similar purposes and some similar procedural provisions does not mean all statutory provisions governing LPS hearings apply at *Keyhea* hearings.

Second, read in context, the LPS statute does not compel the introduction of evidence by family members, it merely permits it. The statute provides that information about the course of a person's disorder "includes" evidence presented by family members. It does not say "must include" or even "shall include."

Third, the LPS statute does not address the ability of a family member to participate at a hearing or confer on a family member the right to provide evidence.[7]

Another LPS statute relied on by Barnick provides in part that if an LPS patient lacks capacity to consent "treatment may be performed upon gaining the written informed consent . . . from the responsible relative or the guardian or the conservator of the patient." (Welf. & Inst. Code, § 5326.7, subd. (g), discussed in *Riese v. St. Mary's Hospital & Medical Center* (1987) 209 Cal.App.3d 1303, 1323.) Barnick does not point to any analogous statute governing *Keyhea* hearings, and we see no reason why the situations are analogous.

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[7] Further, but not dispositive by any interpretations, by statute an inmate "is provided counsel at least 21 days" before a *Keyhea* hearing. (See Pen. Code, § 2602, subd. (c)(6).) Griffin's counsel can decide whether to call Barnick to give evidence at the *Keyhea* hearing.

DISPOSITION

The judgment is affirmed. Barnick shall pay CDCR's costs of this appeal. (See Cal. Rules of Court, rule 8.278 (a)(1).)

/s/
Duarte, J.

We concur:

/s/
Blease, Acting P.J.

/s/
Mauro, J.